72-1138

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1138

HAROLD W. HARRISON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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OCTOBER TERM, 1972

Docket No.

HAROLD W. HARRISON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Harold W. Harrison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 12, 1972.

Opinion Below

The Court of Appeals filed no opinion. The opinion of the district court, denying judgment of acquittal, not officially reported, appears at 72-2 USTC, ¶9573 (CCH), and is reprinted in an Appendix bound with this petition.

The Second Circuit's opinion reversing the petitioner's first judgment of conviction herein is reported at 451 F. 2d 1013 (2d Cir. 1971).

Jurisdiction

The judgment of the Court of Appeals was entered on December 12, 1972. A timely petition for rehearing and a hearing en banc was denied January 19, 1973. Jurisdiction in this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Does the deliberate refusal of the Internal Revenue Service to accept individual income tax returns which it prepared for petitioner as his, as commanded by statute and regulations, void this criminal prosecution for failure to file the same returns?

2. Was petitioner denied a fair trial by the court's failure to charge the jury on elements of the offense, refusal to charge on defense theories, and giving the jury conflicting instructions?

3. Were the petitioner's rights to due process, to be free from self incrimination, and to counsel, violated by the admission at the trial below of statements taken from him by a special agent of the Internal Revenue Service who had not given petitioner the warning required by regulation?*

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* Should certiorari be granted, petitioner wishes to reserve the right to argue that he was further denied due process by the use of the proposed Federal Rules of Evidence to admit prejudicial testimony and exhibits otherwise excludible.

Statute Involved

26 U.S.C. §6020(b):

"(b) Execution of return by Secretary.—

(1) Authority of Secretary to execute return.—If any person fails to make any return (other than a declaration of estimated tax required under section 6015 or 6016) required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

"(2) Status of returns.—Any return so made and subscribed by the Secretary or his delegate shall be prima facie good and sufficient for all legal purposes."

Statement of the Case

Petitioner, Harold W. Harrison, was found guilty on August 3, 1972 by a jury in the United States District Court for the Eastern District of New York on all counts of Information 69 Cr. 465, which charged him with the willful and knowing failure to make income tax returns for the calendar years 1963-6, in violation of 26 U.S.C. §7203. (1a, 5a, 425a).[1] Petitioner was sentenced to 2 months imprisonment and a $1,500 fine concurrently on each count (425a-6a).

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[1] References in the form "—a" are to petitioner's appendix on appeal filed in the Court below.

1. Failure to file by the Internal Revenue Service.

For each of the years in question, 1963-6, there was filed timely on behalf of petitioner a "partnership income tax return" which fully disclosed all of the income as petitioner's which the prosecution claimed in the information and at the trial below required the filing of individual income tax returns. (131a-6a; Ex.s A-D, 428a-1-23). Each of these returns was exhaustively audited by agents of the Internal Revenue Service who determined them to be correct. (108a, 133a, 273a, 276a). After the audit of the partnership returns, a revenue agent prepared individual returns for Mr. Harrison for the years 1963-6, pursuant to the command of 26 U.S.C. §6020(b)(1) and the regulations thereunder[2] (Ex. F; 160a-1a, 430a-1a).

However, the Internal Revenue Service failed to follow the command of 26 U.S.C. §6020(b)(2) that the returns prepared by the revenue agent for petitioner "*shall* be prima facie good and sufficient for all legal purposes." (emphasis added). Instead, the Internal Revenue Service caused the filing of the Information in this case which charged the petitioner with the criminal offenses of failing to file the very returns which had been prepared for him by the revenue agent.

All these factors were brought to the attention of the trial court in a motion for a judgment of acquittal or dismissal of the information (10a-53a), on the ground that a criminal prosecution may not be maintained for a failure to perform an act when statute and regulations there-

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[2] Regs., §301.6020-1(b)(1); Internal Revenue Manual (hereinafter cited as I.R.M.) §§4562.3(6), 4562.33(1), 4562.4. The Internal Revenue Manual is a collection of Internal Revenue Service regulations instructing agents in the procedure they must follow.

under require an administrative agency to perform the same act when it has the necessary information provided by the defendant. This motion, renewed after the prosecution rested (326a-7a), when both sides rested (365a-6a), and post-trial (408a-09a), was denied. (Ibid.; 54a-65a).

2. Erroneous instructions on the elements and defense theories denied petitioner a fair trial.

On April 15, 1963, the due date of the first return the Government claimed petitioner failed to file, petitioner's father-in-law, Walter Klimas, was admitted to Meadowbrook Hospital for what proved to be a protracted final illness that persisted throughout all the years here in question (302a, 307a-08a, 312a). Since Mr. Klimas' physical and mental deterioration rendered him incapable of taking care of himself, he was, on the recommendation of his doctor, placed in an extended care unit after being discharged from Meadowbrook hospital (313a, 302a, 304a-05a). Petitioner paid for the extended care unit expenses of his father-in-law, as well as the expenses of the doctor and nurse who attended him at that institution (304a-06a). One of the principal defense theories at the trial was that Mr. Harrison, because of the heavy burden of his father-in-law's medical expenses, felt he had no net income during these years and was required to file no returns other than the timely partnership returns which reported his income and was so distracted by the actual and prospective burden of his father-in-law's illness that the willful non-filing of individual tax returns was the furthest thing from his mind. Defense requests to instruct the jury on these defenses (Nos. 17, 18 and 23; 417a-18a, 422a-24a) were denied (373a, 375a, 382a). Apart from a refusal to instruct the jury on essential theories of defense, the denial of requests 17 and 18 erroneously left

the jury with the impression that Mr. Klimas may have been eligible for Medicare for his extended care when he was not under 20 C.F.R. § 404.369, since the extended care began after the effective date of the Act and was not thereafter followed by another hospital admission, and failed to insruct the jury that under 26 U.S.C. §§ 152, 213(a), (e), and the regulations thereunder petitioner was entitled to a deduction for medical expenses, including extended care unit expenses for his father-in-law. The latter was particularly serious since the special agent who investigated the case had allowed Mr. Harrison an exemption for his father-in-law during the years in question, based upon the payments Mr. Harrison had made to the extended care unit, thus recognizing that the father-in-law was a dependent, a status which should have given petitioner a medical deduction for expenses at the extended care unit which the special agent erroneously denied (167a-168a).

The trial court also refused (384-5a) to instruct the jury as requested (416a) that the "willfulness" which is an element under 26 U.S.C. § 7203 required the government to prove beyond a reasonable doubt that petitioner "failed to make these returns with the bad purpose of concealing from the Government the extent of his tax liability . . ." (416a). This ruling, in conflict with decisions of this Court and the decisions of other circuits, was particularly prejudicial in that it was a further elimination of the defense that petitioner, under the impression he had no tax liability during these years because of the medical expenses he incurred on behalf of his father-in-law, was not willful.

On yet another element of the offense, the very failure to file returns, the trial court gave the jury conflicting instructions. During the course of the trial, the court in-

structed the jury, "if you want to find that the return or paper filed on behalf of the partnership satisfies the statutory obligation of this defendant, you may do so, in accordance with my instructions." (255a). However, in its final instruction to the jury the trial court charged, "It is no defense to the charges that the defendant's income from the law firm was disclosed to the Government by the filing of a partnership return, but you may consider this evidence in deciding the defendant's state of mind." (392a)

3. The special agent's failure to give the required warning.

In 1967, I.R.S. issued instructions to all Special Agents of the Intelligence Division that in criminal tax cases a special agent is required to inform all taxpayers under investigation, *including those not in custody,* of the nature of the investigation and of the taxpayer's right to remain silent and to retain counsel. 7 CCH 1967 Stand. Fed. Tax Rep. § 6832. The special agent who took statements from petitioner in 1968 admitted that he knew of the regulation, that it was a by-law, and that he was required to give it in every case to every type of citizen that he contacted (114a-15a).

In this case, the special agent did not inform petitioner until near the end of the second lengthy interrogation that petitioner's returns could not be found (80a-3a).

The special agent who interrogated the petitioner gave him no advance notice by telephone or otherwise but just "walked right in" to his office (113a). In the memorandum of his second interrogation of the petitioner, the special agent noted the advice that he had given petitioner on both occasions which made no mention of petitioner's

right to counsel (73a-5a). Under questioning by the prosecutor, the special agent testified that he believed he told petitioner that he had a right to have a representative present, but could not recall whether he said that representative could be an accountant or an attorney (93a). It is clear that the prosecution failed to sustain its burden of showing even that the required warning was given let alone that there had been any knowing waiver by petitioner of the rights that such a warning—here incomplete or entirely absent—would have made him aware. Nonetheless, the trial court admitted the special agent's testimony that petitioner allegedly said his returns had been filed and instructed the jury that it could infer guilt from such allegedly false exculpatory statements (94a, 394a).

Reasons for Granting the Writ

1. Uniform application of the standards of due process in federal criminal trials, and of the Internal Revenue laws and regulations compel a judgment of acquittal in this as in other similar cases.

The decisions below constitute a serious departure from the rulings of this Court on due process required of an administrative agency. In *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 268 (1954), this Court held that an agency of the federal government must scrupulously follow established procedures. See also *Vitarelli* v. *Seaton,* 359 U.S. 535, 539-40 (1959), *Service* v. *Dulles,* 354 U.S. 363, 383-7 (1957); and *Bridges* v. *Wixon,* 326 U.S. 135, 153 (1945). Where failure to follow administrative procedures results in a criminal prosecution, the defendant is entitled to a judgment of acquittal. *Parisi* v. *Davidson,* 405 U.S. 34, 43 (1972).

The *statute* involved in this case, 26 U.S.C. §6020(b), requires that the Secretary or his delegate file returns for non-filing taxpayers, when he has information allowing him to do so. The duty is delegated to district personnel by regulation. Reg.s, §301.6020-1(b)(1). That the Internal Revenue Service had sufficient information from petitioner's timely filed partnership returns to allow compliance with statute and regulation is shown by the fact that the revenue agent in this case did prepare such returns for petitioner reporting that very income. (Ex.F, 430a; 163a-4a)

Internal regulations contained in the Internal Revenue Manual of instructions for agents demonstrate that civil—not criminal—procedures apply to returns prepared for taxpayers such as the ones prepared for petitioner.

I.R.M., § 4562.4 provides:

> "(1) When there has been a failure to file a return of income, estate or gift taxes, a "substitute Return" will be prepared by Audit Division at the time the preliminary letter is issued, an assessment is made, or a statutory notice of deficiency is issued, whichever date is the earlier. It will be prepared on the return form prescribed for use in making such a return. It will contain the following entries:
>
> (a) "Substitute for Return Prepared by Audit Division" (entered in bold lettering on face of return).
>
> (b) Taxable period . . .

(c) Name and address of the taxpayer (as it should appear on the statutory notice of deficiency).

(d) Employer Identification Number (Form 1120).

(e) Social Security Number (Form 1040).

(2) Line item amounts (tax base data) should not be shown on the "Substitute for Return" since the total tax liability for the period will be taken into account in the Revenue Agent's report and entered on the Master File from the I Card of the form 1247 (Examination Record). *The "Substitute for Return" will become a permanent part of the record in the case even though the taxpayer should subsequently file a return.*

* * *

(4) . . . when it becomes necessary employ the "Substitute for Return" procedure for a delinquent ADP period, the "Substitute for Return" must be input into the ADP system approximately four weeks prior to release of the I card, in order to prepare the Master File to receive the I card.

(5) *The appropriate standard preliminary letters,* identified in I.R.M. 4432,[3] *will be used in all cases in which there has been a failure to file returns.*

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[3] These "preliminary letters", commonly known as "30-day letters", notify a taxpayer of the proposed assessment and grant him a period of 30 days within which to file a protest and secure a conference seeking an administrative reduction of the assessment. (i.e., a "Substitute for Return" triggers the same administrative review procedure—non-criminal—as a return filed by the taxpayer).

> (6) *The appropriate statutory notices of deficiency,* identified in I.R.M. 4463,[4] *will, without modification be used when required."* I.R.M., § 4562.4 (emphasis added)

The regulation just quoted, reflecting returns I.R.S. prepares for a taxpayer trigger civil not criminal proceedings, is an accurate following of the command of the Code. 26 U.S.C. §6020(b)(2) provides:

> "Any return so made and subscribed by the Secretary or his delegate *shall* be prima facie good and sufficient for all legal purposes." (emphasis added)

It was that statutory command and the above quoted regulatory procedure that was disregarded in this case by the institution of a criminal prosecution against petitioner for the non-filing of the very returns which I.R.S. had prepared for him. Where the command of the statute is clear as here, there is no need to resort to legislative history, as did the trial court, 72-2 USTC at pp. 85, 353-4, particularly where it is as sketchy as it is here. *N.L.R.B.* v. *Plasterers' Local Union No. 79,* 404 U.S. 116, 129 n.24 (1971); *United States* v. *Bass,* 404 U.S. 336, 339 (1971). Here the administrative determination, Regs, §301.6020-

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[4] The "statutory notice of deficiency", commonly known as a "90 day letter" notifies the taxpayer of an assessment and informs him that he has a period of 90 days within which to petition the United States Tax Court for a review of the assessment. The notice of deficiency is used by I.R.S. either in lieu of the 30-day letter or following it if a taxpayer fails to avail himself of administrative review or such review fails to produce agreement. (i.e., the "Substitute for Return" furnishes the same civil basis for an assessment and Tax Court review as a return filed by the taxpayer).

1(b) (2), I.R.M. §4562.4,[5] "is entitled to great weight." *C.I.R.* v. *First Security Bank of Utah, N.A.*, 405 U.S. 392, 404 n.16 (1972). The administrative interpretations of 26 U.S.C. § 6020(b)(2) are that the Service's duty to prepare returns for a taxpayer when performed, as it was here, satisfies the taxpayer's duty as to those returns. The contrary ruling below runs afoul of this Court's holding in *United States ex rel. Accardi* v. *Shaughnessy, supra,* and the denial of acquittal to petitioner, *Parisi* v. *Davidson, supra,* sanctions a constitutionally infirm departure from regulatory as well as statutory procedures.

The decision below is also in conflict with that of the District of Columbia Circuit in *Stockstrom* v. *C.I.R.*, 190 F.2d 283, 289 (D.C. Cir. 1951), holding that where the I.R.S. has sufficient information from a non-filing taxpayer, the I.R.S. has a duty to prepare the returns under the predecessor to 26 U.S.C. §6020(b).[6] See also *Lucia* v. *United States,* 447 F.2d 912, 916 n.5, 922-3 (5th Cir. 1971), rehearing *en banc* granted 451 F.2d 1024. *Stockstrom* is in accordance with—as the decisions below are in conflict with—this Court's decision in *Germantown Trust Co.* v. *C.I.R.*, 309 U.S. 304, 308 (1940), holding that a taxpayer who had filed information returns, analogous to the part-

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[5] Rev. Rul. 70-632 provides that married persons may file a late joint return where a District Director has previously made an individual return for one of the taxpayers under I.R.C. 1954, §6020(b). Thus for the purposes of such an election pursuant to I.R.S. 1954, §6013(b)(1), a return prepared for a taxpayer by I.R.S. is treated as the exact equivalent of a return made by the taxpayer himself.

[6] Another point in *Stockstrom,* that the Commissioner's adherence to a position of tax law later found by him to be erroneous created a bar to a legal change of position by way of equitable estoppel was disapproved by this Court in *Automobile Club* v. *C.I.R.*, 353 U.S. 180, 183-5 (1957).

nership returns filed for petitioner (neither computed a tax), should not be penalized even civilly under the I.R.S. contention that other returns should have been filed. This Court has held that where a citizen has complied, however irregularly, with a requirement to supply information, a criminal prosecution for failure to file cannot be maintained. *Venus* v. *United States*, 368 U.S. 345 (1961), *Ward* v. *United States*, 344 U.S. 924 (1953).

This Court has never passed upon the duty of the Internal Revenue Service, under 26 U.S.C. §6020(b), to prepare returns for taxpayers who have supplied the necessary information. The Internal Revenue Code is, of course, nationwide in application. Its Congressional purpose is clear—to secure the prompt collection of revenues. The procedure followed in this case defeats that purpose. Five years ago, a revenue agent prepared returns for petitioner which should have been treated as his under Section 6020(b)(2) and which should have led to prompt collection of any taxes determined to be due under I.R.M., § 4562.4. Instead the Service denied the returns it had prepared their statutory effect, allowed the special agent to suspend all civil features of the case (110a), so that in all the intervening time up to the date of this petition there has been no attempt by I.R.S. to seek a determination or collection of the tax which may be due on these returns.

This Court may not at this time wish to set definitive guidelines for the I.R.S. duty to prepare returns. However, it is respectfully submitted that the time is ripe for a ruling by this Court that when I.R.S. *has* in fact performed its duty by preparing returns for a taxpayer it may not refuse to give them the legal effect required by statute and regulation by instituting an intervening criminal prosecution. See *Parisi* v. *Davidson, supra.* Such a

ruling would not only protect the due process rights of all other similarly situated citizens, it would speed the collection of the revenues and be an effective step in decongesting federal criminal dockets. The absence of such a ruling will allow the I.R.S. to withhold legal recognition of returns prepared by it in some cases in favor of discriminatory prosecution. See *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972).

The decisions below are also in conflict with those of other Circuits which hold that, under 26 U.S.C. §6020 (b) (2) and its predecessors, returns prepared by the I.R.S. are the returns of the taxpayer and support valid assessments even over the taxpayer's objection. *Ardbern Co.* v. *C.I.R.*, 120 F. 2d 424, 425 (4th Cir. 1941); *Blenheim Co.* v. *C.I.R.*, 125 F. 2d 906, 908 (4th Cir. 1942); *Scully* v. *United States*, 70 F. Supp. 239, 240 (Ct. Cl. 1947), 70 F. Supp. 255, 260 (Ct. Cl. 1947) (2 cases); *United States* v. *Goggin*, 123 F. 2d 432, 433 (9th Cir. 1941); *Kahle* v. *C.I.R.*, 43 F. 2d 61 (8th Cir. 1930), *Geerday Enterprises* v. *C.I.R.* 126 F. 2d 384, 386 (4th Cir. 1942); *Reams* v. *Trooman-Fehn Printing Co.*, 140 F. 2d 237, 239 (6th Cir. 1944), *Southeastern Fair Assn.* v. *United States*, 52 F. Supp. 219, 220 (Ct. Cl. 1943), *Kjar* v. *United States*, 69 F. Supp. 406, 407 (Ct. Cl. 1947).

A ruling by this Court is also necessary to eliminate the denial of equal protection to petitioner and other taxpayers similarly situated. The Second Circuit has held that a criminal prosecution may not be maintained for failure to perform an act when administrative regulations require a governmental agency to substitute its act for that of the defendant in the case of immigration and narcotics laws, *United States* v. *Jones*, 368 F.2d 795 (2d Cir. 1966), and selective service laws, *United States* v. *Norton*, 179 F.2d 527 (2d Cir. 1950), but has denied the same relief to peti-

tioner under the Internal Revenue Laws. This Court, it is respectfully submitted, should clearly state that citizens subject to the Internal Revenue Code are guaranteed the same due process standards as are citizens subject to other laws. See *McNabb* v. *United States*, 318 U.S. 332, 343 (1943) and *Stanley* v. *Illinois*, 450 U.S. 645, 653-4 (1972).

2. A fair trial was denied by the refusal to charge on the elements of the offense and defense theories and by conflicting instructions.

There is a deep and acknowledged conflict between the various circuits on the meaning of the element of willfulness in 26 U.S.C. §7203.

The instruction to the jury below followed the Second Circuit's recent decision in *United States* v. *Platt*, 435 F. 2d 789, 794 (2d Cir. 1970), that Section 7203 willfulness requires only proof that the alleged failure to file was intentional and knowing and was not a result of accident, mistake or other innocent cause (384a-5a). That decision is approximately in accord with, although it does not cite, *Abdul* v. *United States*, 254 F. 2d 292 (9th Cir. 1958). See *United States* v. *Fahey*, 411 F. 2d 1213, 1214 (9th Cir. 1969), discussing the conflict between the Circuits, as to which, see also the Solicitor's brief in *United States* v. *Bishop*, Docket No. 71-1698.

To the contrary (and in accord with the charge requested on behalf of petitioner below (415a-16a) are *Haner* v. *United States*, 315 F. 2d 792, 794 (5th Cir. 1963); *United States* v. *Vitiello*, 363 F. 2d 240, 243 (3rd Cir. 1966), *United States* v. *Palermo*, 259 F. 2d 872, 877-80 (3rd Cir. 1958), *United States* v. *Hartman*, 409 F. 2d 198, 199 (3d Cir. 1969) and cases there cited, and *United States* v. *Goodman*, 190 F. Supp. 847, 851-2 (N.D. Ill.

1961). The cases just cited hold that Section 7203 willfulness requires proof of an evil motive and bad purpose, a specific intent to do that which the law forbids, with the purpose of concealing from the government the extent of the defendant's tax liability. These decisions rely upon the express language of *United States* v. *Murdock,* 290 U. S. 389, 395, 397 (1933), where this Court affirmed reversal of a conviction under an earlier version of Section 7203. This Court's decisions in *Spies* v. *United States,* 317 U. S. 492, 498 (1943), citing *Murdock,* and *Sansone* v. *United States,* 380 U. S. 343, 351 (1965), support the instruction requested by petitioner, by distinguishing between the offense of evasion (Section 7201) and the offense of failure to file (Section 7201) not on any difference in the content of willfulness which is an element of both Sections but upon the "attempt" which is an element of Section 7201 alone.

The clarity that would come from this Court's resolution of the conflict by granting review in this case would assure uniform application of standards of culpability in federal criminal cases.

Another basic problem with the position of the Second and Ninth Circuits is that it allows conviction of a crime on the strength of the same (or even less) evidence that would suffice in a civil case under 26 U.S.C. §6651, which imposes a 25% addition to the tax "unless it is shown that such failure [to file] is due to reasonable cause and not due to wilful neglect." *Spies* holds that the Internal Revenue Code provides a graduated series of sanctions rising from civil to criminal penalties. 317 U.S. at 495-7. The Second and Ninth Circuits have reversed the hierarchy or, at the very least made the sanctions indistinguishable. Not only do those holdings nullify the structure of the Code, they run counter to this Court's holding

that it amounts to "a lack of fundamental fairness" to allow conviction on the "same evidence as would suffice in a civil case." *In re Winship*, 397 U.S. 358, 363 (1970).

The denial of the requested instruction on willfulness was particularly prejudicial to petitioner since the defense had shown that he had incurred heavy—and deductible—medical expenses on behalf of his father-in-law during all years and hence had little if any tax liability (Exs. J-1, J-2, J-3, 434a). Petitioner was entitled to have the jury instructed that it could infer lack of willfulness from the lack of a tax liability to conceal.

Similarly the refusal to instruct the jury that petitioner's father-in-law was ineligible for medicaid and was an allowable dependant exemption for petitioner which in turn granted petitioner deductible medical expenses for the father-in-law (417a-18a, 423a, 373a, 375a, 382a) also denied jury consideration of the defense. This is contrary to the teachings of *Murdock*, *Spies*, and *Sansone*, which emphasize that the defendant's state of mind on concealment is crucial on the issue of willfulness. See *Cool* v. *United States*, —— U. S. ——, 93 S. Ct. 354 (1972).

The instructions to the jury that the timely filed partnership returns could be considered as a compliance with the statute (255a) conflicting with the final instruction that filing of those returns was no defense (392a) vitiated the conviction. See *Cool*, —— U. S. ——, 93 S. Ct. at 356. The sanctioning of such conflicting instructions is also contrary to the decisions in other Circuits *United States* v. *Bagby*, 451 F. 2d 920, 927 (9th Cir. 1971); *Perez* v. *United States*, 297 F. 2d 12, 16 (5th Cir. 1961); *Stump* v. *Bennett*, 398 F. 2d 111, 116 (8th Cir. 1968); *Polansky* v. *United States*, 332 F. 2d 233, 236 (1st Cir.

1964); *Smith* v. *United States,* 230 F. 2d 935, 939 (6th Cir. 1956); *Thomas* v. *United States,* 151 F. 2d 183, 187 (6th Cir. 1945).

3. Uniform application of the warning required of special agents of the I.R.S. is necessary.

Since 1967, the Internal Reveinue Service has required special agents of the Intelligence Division to warn all taxpayers they were investigating of the criminal nature of the investigation and that the taxpayers had the right to remain silent and to retain an attorney. The purpose of the regulation is to require uniform notice to all taxpayers whether in custody or not, 7 CCH 1967 Stand. Fed. Tax Rep. §6832. See *United States* v. *Heffner,* 420 F. 2d 809, 811 (4th Cir. 1970).

At least three circuits have held that statements taken from taxpayers without the giving of the warning required by I.R.S. regulation will be suppressed. *United States* v. *Heffner, supra; United States* v. *Leahey,* 434 F. 2d 7, 11 (1st Cir. 1970); *United States* v. *Dickerson,* 413 F. 2d 1111, 1117 n.13 (7th Cir. 1969). The rationale of these decisions is that due process requires the enforcement of the I.R.S. regulation which, publicly announced, states that it is to be uniformly applied. Failure to give the warning under such circumstances would be tantamount to a misrepresentation of the nature of the investigation and its potential consequences. *Leahey,* 434 F. 2d at 10; *Dickerson,* 413 F. 2d at 1116. By its failure to follow these decisions in the present case, the Second Circuit has aligned itself in conflict with them and has failed to distinguish between a situation where the warnings are required by regulation of the I.R.S. and cases arising prior

to that regulation where the Second Circuit has held that *Miranda* v. *State*, 384 U. S. 436 (1966), does not apply to special agents' investigations if the taxpayer is not in custody. See *United States* v. *Caiello*, 420 F. 2d 471, 473, 476 (2d Cir. 1969).

In *Mathis* v. *United States*, 391 U. S. 1 (1968), this Court held inadmissible statements taken from a defendant, while he was in state prison, by a revenue agent who failed to give the *Miranda* warning. Justice White, with whom Justice Stewart and the late Justice Frankfurter concurred, dissented, stating, "I had not thought that *Miranda* extended its checklist of warnings to these civil investigations." 391 U. S. at 7. The Internal Revenue Service has itself extended that check-list to potentially criminal investigations, such as the one in this case, conducted by special agents. This Court has not yet considered the effect of the new regulations. In view of the fact that the announced purpose of the I.R.S. warning requirement is uniformity of application and there is a conflict among the circuits, review of this case seems appropriate to ensure uniformity, to rectify the denials of due process, freedom from self incrimination, and right to counsel which occurred in this case, and to prevent recurrences of such denials.

In *Miranda*, this Court held that the prosecution may not use statements, "exculpatory or inculpatory", taken from a defendant "unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination . . [and the] right to the presence of an attorney . . ." 384 U. S. at 444. When the admission of the statements taken from petitioner by the special agent was challenged at the trial below, the prosecution failed to carry its burden of showing compliance with the I.R.S warning regulation.

The special agent testified that he did not inform petitioner of the nature of his investigation (that petitioner's returns could not be found) until near the end of the second lengthy interrogation (80a-84a), that he didn't remember if he told petitioner the investigation was civil or criminal (93a), that he couldn't remember whether he told petitioner an accountant or an attorney could be present (93a) and that any warning he may have given at the second interrogation—the same as at the first—was recorded on his report as only involving a reference to self-incrimination (75a).

Despite the special agent's admission that he knew at the time he questioned petitioner he was required to give the warning to all types of citizens including attorneys (115a), it seems that he, at least in part, relied upon the fact that petitioner was an attorney (86a) in omitting the warning. This Court has long held that attorneys are entitled to no less protection of their right to counsel than other citizens. *Glasser* v. *United States*, 315 U. S. 60, 70-1 (1941). The record must show that an offer of counsel was made, understood, and intelligently waived, *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962), in the absence of which the prosecution fails to sustain its burden of proof on the admissibility of the statements obtained, *Miranda*, 384 U. S. at 444, 475. From this record there can be no inference of waiver. Ironically enough, the basis of the reversal of petitioner's conviction on the first appeal was that it had been demonstrated that petitioner was not able to protect himself without an attorney, even though a waiver of counsel had been filed in open court. 451 F. 2d at 1015. The court below further held on that occasion that petitioner was entitled to a specific instruction as to his right to counsel. 451 F. 2d at 1014.

The warnings required by the I.R.S. were not given, the prosecution failed to sustain its burden on the admissibility of the resulting statements, and the conviction should be reversed. A declaration by this Court that the rule of the First, Fourth and Seventh Circuits is the correct one would settle this problem of national importance involving the single governmental agency which directly affects most of our citizens. ". . . a clear rule excluding admissions secured by an agent who has not conformed to required procedure would be more likely to decrease, rather than increase the number of such motions and hearings." *United States* v. *Leahey*, 434 F. 2d at 10.

CONCLUSION

For these various reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LLOYD A. HALE
Attorney for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Memorandum and Order of the United States District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

69 CR 465

UNITED STATES OF AMERICA,

Plaintiff,

—against—

HAROLD W. HARRISON,

Defendant.

Appearances:

Honorable Robert A. Morse, United States Attorney
for the Eastern District of New York
U. S. Court House
225 Cadman Plaza East
Brooklyn, New York 11201
Joseph Ryan, Jr., Esq.
Of Counsel

Lloyd A. Hale, Esq.
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New York, New York 10036
Attorney for Defendant

WEINSTEIN, D. J.

Charged with willful and knowing failure to file income tax returns for the years 1963 through 1966 in violation

of Section 7203 of Title 26 of the United States Code, defendant moves for a judgment of acquittal or dismissal. For the reasons stated below, prosecution must be permitted.

I. Issues Presented

The motion is based on a claimed conflict between two sections of the Internal Revenue Code. Section 7203 of Title 26 of the United States Code, requiring the filing of tax returns by the prospective taxpayer, provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor . . . .

By contrast, Section 6020(b) of Title 26 gives authority to the government to file a return on behalf of the taxpayer. It reads in part:

> (1) Authority of Secretary to execute return.—If any person fails to make any return . . . or makes, willfully or otherwise, a false or fraudulent return, the Secretary or his delegate shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
>
> (2) Status of returns.—Any return so made and subscribed by the Secretary or his delegate shall be

prima facie good and sufficient for all legal purposes.

Defendant contends that the filing of partnership returns triggered the Internal Revenue Service's duty under Section 6020(b) and pertinent regulations to execute individual returns for him from information available from his partnership returns and other sources. He argues that if the Internal Revenue Service prepared such an individual return which, according to the statute and regulations, is "prima facie good and sufficient for all legal purposes" (26 U.S.C. § 6020(b) (2) and Treas. Reg. § 301. 6020-1(b)(2)), he cannot be prosecuted under Section 7203 for failure to file a return. If the Internal Revenue Service did not prepare such a return, defendant advances an argument in the nature of estoppel that the government is barred from prosecuting him because of its violation of its own obligation to file a return for him.

No case has been brought to our attention suggesting that reliance on Section 6020(b) constitutes "reasonable cause" for failure to file. That interpretation of the statutes is inherently implausible and is contrary to the conclusion required by normal canons of statutory interpretation.

II. The Statute and Legislative History

An essential premise of defendant's argument is that Congress intended, by enacting Section 6020(b), to alter significantly the obligation of taxpayers to file returns where there is information in government files from which a return can be constructed. The legislative history of Section 6020(b), its language, its context in the Inter-

nal Revenue Code, and the predecessor laws from which it was derived belie this assumption.

According to the "Detailed Discussion of Technical Provisions of the Bill" in the House Ways and Means Committee Report, Section 6020 contained "no material change from existing law." 3 U. S. Code Congressional and Administrative News 4546 (1954). Except for a provision relating to corporate taxes not relevant here, the same language was used in detailed discussion of the bill in the Senate Finance Committee Report. *See id.* at 5213.

By its terms Section 6020(b) directs the Secretary of the Treasury or his delegate to execute returns required by any internal revenue law or regulation whenever any person fails to file a required return (as defined in the section) or makes "willfully or otherwise, a false or fraudulent return." Such returns are defined as "prima facie good and sufficient for all legal purposes." The section appears in subchapter B, "Miscellaneous Provisions," of chapter 61, titled "Information and Returns," of subtitle F, "Procedure and Administration." Other chapters of subtitle F specify the time and place for paying tax (chapter 62), procedures for assessment and collection of taxes (chapters 63 and 64), time limitations on assessment and collection and on credits or refunds (chapter 66), the circumstances under which additions to the tax and other money penalties may be imposed, and the amount of such penalties (chapter 68), procedures for making jeopardy assessments (chapter 70), and criminal and forfeiture sanctions for violations of the internal revenue laws (chapter 75).

Construed on the basis of its position in the Code, the purpose of Section 6020(b) is to provide the Internal Rev-

enus Service with an administrative mechanism for assessing unreported tax obligations and for imposing what may be termed the "civil sanctions" of the Code. Read together with other relevant sections, it cannot be interpreted as foreclosing civil or criminal sanctions for acts or omissions of the taxpayer. Thus Section 6501(b)(3) of Title 26 provides that "notwithstanding the provisions of paragraph (2) of section 6020(b)" (which define returns executed by the Secretary or his degelate as "prima facie good and sufficient for all legal purposes"), the filing of a return by the Internal Revenue Service under Section 6020(b) "shall not start the running of the period of limitations on assessment and collection." Section 6651(a) of Title 26 imposes mandatory money penalties on those who fail to file any required return (with certain specified exceptions not relevant here) on the prescribed date "unless it is shown that such failure is due to reasonable cause and not due to willful neglect." Moreover, Section 7203 specifies that any person who willfully fails to make a return required by statute or regulations "shall, *in addition to other penalties provided by law*, be guilty of a misdemeanor. . . ." (emphasis supplied). See also Treasury Regulations §301.6020-1(b)(3) and (c), implementing section 6020(b) of Title 26 and continuing cross references to civil and criminal penalties. *Cf. Spies* v. *United States*, 317 U.S. 492, 495-97, 63 S. Ct. 364, 366-67 (1943), noting that the civil and criminal sanctions of the tax laws operate as independent remedies and that "invocation of one does not exclude resort to the other." 317 U.S. at 495, 63 S. Ct. at 366.

Since at least 1864 the internal revenue laws have contained provisions similar to those now embodied in Section 6020(b). *See* Act of June 30, 1864, ch. 173 § 14,

13 Stat. 226; Act of July 13, 1866, ch. 184 § 9, 14 Stat. 101; R.S. § 3176 (2d ed. 1878); 26 U.S.C. § 3612 (Int. Rev. Code of 1939). Their mandatory language to internal revenue officers to execute returns for delinquent taxpayers and to assess and collect taxes and money penalties was not for the purpose of relieving taxpayers of the obligation to file returns, but rather of protecting public treasury and insuring adequate notice to taxpayers of delinquency. *See Bailey* v. *Railroad Company,* 89 U.S. (22 Wall.) 604, 639 (1874). The successive statutes did not provide that filing of returns by internal revenue officers foreclosed civil or criminal sanctions; on the contrary, they established the substitute returns as an integral part of the collection and civil sanction mechanism of the tax system.

Relevant revenue laws, Section 3612 of Title 26 of the United States Code (Internal Revenue Code of 1939) and Revised States § 3176 (2d ed. 1878) combined in one section a mandate to tax officials to execute returns for delinquent taxpayers and to assess and collect money penalties in addition to the computed tax. In Section 3612 the mandate was divided into six subsections. The first two, 3612(a) and (b), in language closely tracking the present Section 6020(b), required internal revenue collectors and the Commissioner to make returns upon failure to file or in the event of the filing of false or fraudulent returns. The third subsection, 3612(c), provided, as does the present Section 6020(b)(2), that such returns shall be prima facie good and sufficient for all legal purposes. The final three subsections, 3612(d)(f), mandated the Commissioner or his delegate to add money penalties to the tax of those who failed to file a return, or who filed fraudulent returns, and to determine, assess, and collect the tax so computed. Section 3612(d)(1) contained the

proviso, now embodied in Section 6651(a), that the money penalties should not be assessed against those whose failure to file "was due to a reasonable cause and not to willful neglect." There is nothing in the language or structure of the predecessor statutes to suggest that Congress meant to allow delinquent taxpayers to plead the collector's duty to file a return under Section 3612(a) as a "reasonable cause" for not filing and thereby avoid penalties under Section 3612(d). *See also* Revised Statutes § 3176 (2d ed. 1878), specifying "neglect caused by sickness or absence" as grounds for extension of time to file and avoidance of money penalties for late filing.

III. Cases, Procedures and Analogous Revenue Provisions

Defendant cites *Novo Trading Corp.* v. *Commissioner,* 111 F. 2d 449 (2d Cir. 1940), in which the Second Circuit held that a collector's return made under Section 3612 satisfied the venue requirement for Court of Appeals review of Board of Tax Appeals decisions. Also relied upon are *Lucia* v. *United States,* 447 F. 2d 912 (5th Cir. 1971), involving a claim that the taxpayer's obligation to file a gambling tax return was tempered by his privilege against self-incrimination, and *United States* v. *Bonaguro,* 294 F. Supp. 750 (E.D.N.Y. 1968), raising the issue of defendant's right to suppress counterfeit currency seized by Treasury Agents. There is no suggestion in the reasoning or circumstances of these cases that the mandate of Section 6020(b) is either a bar to, or a predicate of, criminal sanctions for violation of the tax laws.

Defendant also argues that the filing of partnership returns constituted, in effect, an irregular but susbtantially

accurate declaration of his income; that the Internal Revenue Service was not prejudiced by his failure to file individual returns; and that the Service had the duty, under Section 6020(b), to execute the proper forms for him. Reliance is placed on cases in which other kinds of information returns were held to be, in certain circumstances, adequate disclosures to meet the requirement of filing and to start the running of the limitation period for assessment of deficiencies. *See Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304, 60 S. Ct. 566 (1940) (filing of fiduciary return by a trust company was sufficient to start the running of the limitation period against a claim that it should have filed a corporate return *Hartford-Connecticut Trust Fund Co.* v. *Eaton*, 34 F. 2d 128 (2d Cir. 1929) (filing on the wrong form did not create civil liability); *Benderoff* v. *United States*, 398 F. 2d 132 (8th Cir. 1968) (subchapter "S" corporate information form attached to individual return was sufficient to start the running of the limitation period). In each of these cases there was a "good faith" and reasonable attempt to comply with the tax laws by reporting "all information necessary to the calculation of any tax which might be due." *Germantown Trust Co.* v. *Commissioner*, 309 U. S. 304, 309, 60 S. Ct. 566, 569 (1940). *See also Hartford-Connecticut Trust Co. v. Eaton*, 34 F. 2d 128, 130 (2d Cir. 1929); *Benderoff* v. *United States*, 398 F. 2d 132, 137 (1968); *Genevieve B. Walker*, 46 T.C. 630, 639 (1966).

The government can certainly make a reasonable argument in a criminal case that as a matter of fact defendant's partnership returns do not constitute a good faith disclosure of all relevant information. To rule that as a matter of law the Internal Revenue Service is required to piece together an individual return from such sources as

partnership returns, W-2 forms, and savings bank and stock transaction reports, and then investigate possible unrecorded sources of income, might place an intolerable burden on the tax system and completely undermine its fundamental reliance on the taxpayer's own disclosures. *See Spies* v. *United States*, 317 U.S. 492, 495, 63 S. Ct. 364, 366 (1943); *United States* v. *Hayes*, 60-2 U.S.T.C. 9783 (E.D. Wis. 1960).

It is not possible to accept at this time defendant's argument that computer technology is sufficiently advanced so that pressing a button would quickly assemble all the material in the government's files providing the equivalent of a full return. It may be that technology will one day permit an electronic device to pick and choose in this way among hundreds of millions of documents placed in government files each year that bear on tax liability. And, if and when that time comes, Congress may wish to reconsider the obligations presently placed upon taxpayers by the applicable statutes and regulations. Until Congress acts, however, we must read and apply the criminal statutes as they are written.

Factual examination of Internal Revenue procedures and of defendant's beliefs with respect to them may have a bearing on the issue of defendant's willfulness in failing to file and may provide a basis for acquittal. But dismissal before development of the factual circumstances is inappropriate.

IV. Conclusion

On the basis of the pleadings, defendant was under a duty to file individual tax returns for the years 1963

through 1966. He did not do so. Nothing in Section 6020(b) of Title 26 of the United States Code precludes his criminal prosecution. Defendant's motion for a directed verdict of acquittal or for dismissal of the information is denied.

So ordered.

Dated: Brooklyn, New York
July 12, 1972

.....
U.S.D.J.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of December one thousand nine hundred and seventy-two

Present:

HONORABLE J. EDWARD LUMBARD,

HONORABLE WILFRED FEINBERG,

HONORABLE WALTER R. MANSFIELD,
Circuit Judges.

Docket No. 72-2002

UNITED STATES OF AMERICA,
Appellee,

—against—

HAROLD W. HARRISON,
Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, including the reply brief dated December 8, 1972, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is Affirmed.

J. Edward Lumbard

Wilfred Feinberg

Walter R. Mansfield

Dated: December 12, 1972

APPENDIX C

Order of United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of January, one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD,
HON. WILFRED FEINBERG,
HON. WALTER R. MANSFIELD,
Circuit Judges.

Docket No. 72-2002

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HAROLD W. HARRISON,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

APPENDIX D

Order of United States Court of Appeals Denying Petition for Rehearing *in Banc*

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of January, one thousand nine hundred and seventy-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD W. HARRISON,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

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APPENDIX E

Order of the United States Court of Appeals Denying Stay

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 31st day of January, one thousand nine hundred and seventy-three.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD W. HARRISON,

Defendant-Appellant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated December 22, 1972, to stay the issuance of the mandate pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41 (b) Federal Rules of Appellate Procedure be and it hereby is denied.

It is further ordered that

J. EDWARD LUMBARD
WILFRED FEINBERG

Circuit Judges